In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1268

THE POSTER EXCHANGE, INC.,
Petitioner,

vs.

NATIONAL SCREEN SERVICE CORPORATION AND COLUMBIA PICTURES CORP.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT NATIONAL SCREEN SERVICE CORPORATION IN OPPOSITION

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QUESTIONS PRESENTED

Whether the concurrent judicial factual findings and determinations by both the District Court and the Court of Appeals—that Petitioner's affidavits submitted in *opposition* to Respondent's motion for summary judgment in two remand proceedings* directed by the Court of Appeals, lacked the requisite evidentiary value demonstrating a triable issue of fact as to the occurrence, during the four (4) years statutory period in suit, of an injurious act or word of refusal by National Screen precluding Petitioner's obtaining standard accessories from Respondent,

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*542 F.2d 255 (1976); 517 F.2d 129 (1975).

or which interfered with Petitioner's access to the motion picture producers' standard accessories, and that a summary judgment dismissal against Petitioner was proper and justified—should be reviewed by this Honorable Court for irrelevant reasons never presented in the Courts below, except in Petitioner's motion in the Court of Appeals for a rehearing made after the Court of Appeals had for the second time determined that:

> "As before, Poster's response was to present affidavits lacking the requisite evidentiary value. (F.R.C.P. 56e and cases cited). Consequently, we find no basis for error in the District Court's granting summary judgment against Poster." (542 F.2d at 257).

STATEMENT OF THE CASE

The historical background of the series of protracted litigations between the parties herein, and Petitioner's New Orleans affiliate and this Respondent, being well known to this Honorable Court, we shall refrain from burdening this Court with any statement reviewing it.

In its "Statement of the Case," Petitioner incorrectly states that in this instant action—which is the Poster No. "2" action, Petitioner seeks damages and injunctive relief to compel Respondent to sell its copyrighted standard advertising accessories to Petitioner. The fact is that Petitioner's complaint does not request injunctive relief. Significantly, when Petitioner was awarded a judgment in Poster No. "1" (7665), Petitioner's proposed judgment neither requested nor included an injunction.

Moreover, the following sworn statements in Petitioner President Cobb's affidavit sworn to February 20,

1974, submitted by Petitioner in the instant case in *opposition* to Respondent's motion for summary judgment—are conclusive contradictions of Petitioner's representation to this Court that it is suing to compel Respondent to sell its advertising accessories to Petitioner, and to recover damages for Respondent's refusal to sell its standard accessories which Petitioner sought to purchase from Respondent:

> "20. Consequently, when plaintiff speaks of a 'continuing conspiracy' plaintiff means not a conspiracy to continue the 1961 refusal to deal, but a conspiracy to continue implementing the illegal exclusive license agreements of the 1940's, which—plaintiff contends—are still in full force and effect, notwithstanding the fact that they have been replaced by allegedly 'non-exclusive' agreements."
>
> "21. Similarly, when plaintiff speaks of suffering continuing losses *plaintiff means not losses flowing from the refusal to deal*, but losses resulting from the exclusive license agreements." (Emphasis added)
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> • • •
>
> "25. The illegal overt acts committed by defendants from February 26, 1965 to February 26, 1969, were (i) acts of the defendant's film companies giving to National Screen, from day to day, exclusive rights of control over, and possession of, all posters produced, and (ii) the acts of National Screen in making periodic payments to the film companies of a substantial share of its profits."
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> • • •
>
> "27. On October 29, 1970, National Screen, *without any request from Plaintiff*, offered to and did resume dealing with Plaintiff. . . ." (Emphasis added)

In addition, in paragraph "31" of President Cobb's affidavit sworn to December 11, 1973, submitted by him in behalf of his wholly-owned New Orleans affiliate "Exhibitors Poster Exchange," in opposition to Respondent's motion for summary judgment in the similar action brought against Respondent and the same motion picture producer defendants, Petitioner's President Cobb said:

> "Plaintiff *has no desire to deal with National Screen* or with any other competitor and *plaintiff's claim is not based on National's 1961 refusal to continue to deal with plaintiff.*" (Emphasis added)

Again, in November, 1971, approximately two years after the entry of the final judgment in Poster No. "1", and during the pendency of the instant Poster No. "2" action, Petitioner moved in Poster No. "1" to amend the judgment by the addition of an injunctive provision which, as previously stated, had not been requested in its proposed judgment entered in 1969. However, the following colloquy between Petitioner's attorney, Mr. Hester, and Circuit Judge Morgan, who as District Judge had tried Poster No. "1", further confirms that Petitioner had not sought to deal with this Respondent during the period in suit and been refused—and therefore, was not seeking to compel Respondent to deal with Petitioner, but that Petitioner was asking the Court to permanently enjoin Respondent from doing business, so that Petitioner would have no competition:

> "The Court: And then you say now they are not selling to you?
>
> "Mr. Hester: No. We are not saying that—we want them out of business. . . . We want a permanent injunction to give us a chance to recapture our customers." (p. 17 lines 22 through 25 and p. 18 lines 1 and 2 of transcript of hearing before Hon. Lewis R. Morgan, U.S. Circuit Judge, in Atlanta on Nov. 23, 1971)

ARGUMENT

Petitioner's attempt at pages "2" through "5" of the Petition to analogize the facts and legal issues in the instant case with those presented in *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322 (1955), and in Poster No. "1," is so patently frivolous, that we shall not burden this Court with any discussion of the utter groundlessness of the contention.

Having been afforded two opportunities by the Court of Appeals' two remands to present evidentiary material that there is a triable issue of fact as to the occurrence of any specific act or word on the part of Respondent during the period in suit, which denied Petitioner access to the motion picture producers' posters, or by refusal, precluded Petitioner obtaining supplies from Respondent—and having failed on both occasions to demonstrate that a triable issue exists as to whether it has actually been refused by Respondent—the Court of Appeals concurred with the District Court that Petitioner had failed to demonstrate that there was any triable issue and that the summary judgment dismissal was justified.

Respondent respectfully submits that Petitioner's belated hearsay and conclusory generalizations were justifiably rejected as a matter of law—particularly since Petitioner's President Cobb's sworn statements in the affidavits submitted in *opposition* to Respondent's motion for summary judgment, conclusively contradicted Peti-

tioner's last-minute contention that Petitioner had requested and that Respondent had refused to deal with Petitioner—born when it realized that the Court would not enjoin Respondent from continuing in business in competition with Petitioner.

CONCLUSION

Respondent respectfully submits that in keeping with the traditional principles long applied by this Honorable Court, that contentions not submitted to and therefore not appraised by the Courts below, will not be considered by this Court: *Burnet* v. *Commonwealth Improvement Co.*, 287 U.S. 415, 418 (1932); and that concurrent findings of fact of the two courts below are not shown to be plainly erroneous, are accepted by this Court as the conclusive basis for decision, *Virginian Railway Company* v. *System Federation No. 40, Railway Employees Dep't of the A. F. of L. etc., et al.*, 300 U.S. 515, 542 (1937), and the cases cited by Mr. Justice Stone, Petitioner's request for a writ of certiorari should be denied.

Respectfully submitted,

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JOHN IZARD

Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Brief of National Screen Service Corporation in Opposition to Petitioner's Petition for a Writ of Certiorari by depositing a copy of the same in the United States Mail with sufficient postage affixed thereto to insure delivery addressed to C. Ellis Henican, Jr., Esq., Henican, James & Cleveland, Suite 4440, One Shell Square, New Orleans, Louisiana 70139, counsel for petitioner; and Tench C. Coxe, Esq., Troutman, Sanders, Lockerman & Ashmore, 1400 Candler Building, Atlanta, Georgia 30303, counsel for Columbia Pictures Corp.

This 8th day of April, 1977.

JOHN IZARD